An Intermediate Standard for Equal Protection Review of Municipal Residence Requirements

I. INTRODUCTION

Employees of many American cities[1] must reside within municipal borders or lose their jobs.[2] Such municipal requirements[3] are a continuing source of litigation and political controversy.[4] Public reaction to these re-

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1. This Comment does not attempt a survey of current municipal residence requirements. Because the requirements may be imposed in a particular jurisdiction by state statute, municipal ordinance, civil service regulation, department rule, or local custom and are, therefore, subject to easy amendment, a list of current requirements would be of fleeting value. For a 1974 survey of requirements in the fifty largest American cities, see Note, *Municipal Employee Residency Requirements and Equal Protection*, 84 YALE L.J. 1684, 1686–89 (1975).

2. *E.g.*, YOUNGSTOWN, OHIO, CIVIL SERV. COMM'N art. IV, § 9(F) (1972) provides: "Any officer or employee not residing within the city limits of Youngstown . . . is subject to dismissal from the service of the city." In Fraternal Order of Police, Youngstown Lodge No. 28 v. Hunter, 49 Ohio App. 2d 185, 360 N.E.2d 708 (1975), *cert. denied*, 424 U.S. 977 (1976), the Youngstown rule was held valid only as it applied prospectively to police and firemen. *See* text accompanying notes 82–87 *infra*. A Newark, N.J., residence requirement has spawned four cases dealing with the validity of the requirements and various waiver issues. The ordinance provides:

> All officers and employees of the city now in the employ of or hereafter to be employed by the city are hereby required as a condition of their continued employment to have their place of abode in the city and to be bona fide residents therein except as otherwise provided by the charter. A bona fide resident, for the purpose of this section, is a person having a permanent domicile within the city and one which has not been adopted with the intention of again taking up or claiming a previous residence acquired outside of the city limits. The director of any department or the mayor or city clerk is hereby authorized in his discretion, for good cause shown, to permit any officer or employee of the city in his respective department or office to remain in the employ of the city without complying with the provisions hereof, where:
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> (a) The health of any officer or employee necessitated residence outside of the city limits;
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> (b) The nature of the employment is such as to require residence outside of the city limits;
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> (c) Special circumstances exist justifying residence outside of the city limits.
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> Failure of any officer or employee to comply with this section shall be cause for his removal or discharge from the city service.

NEWARK, N.J., REV. ORDINANCE 2:14–1 (1951). *See* Abrahams v. Civil Serv. Comm'n, 65 N.J. 61, 319 A.2d 483 (1974); Kennedy v. City of Newark, 29 N.J. 178, 148 A.2d 473 (1959); Trainor v. City of Newark, 145 N.J. Super. 466, 368 A.2d 381 (App. Div. 1976), *cert. denied*, 74 N.J. 255, 377 A.2d 661 (1977); Smith v. City of Newark, 136 N.J. Super. 107, 344 A.2d 782 (App. Div. 1975).

3. This Comment uses the term municipal residence requirements; the requirements are often referred to as municipal residency requirements, bona fide continuing residence requirements, or post-employment residence requirements. A distinction is made between a municipal residence requirement and a durational requirement, which imposes a requirement of residence for a specified number of years before appointment to a job, receipt of a governmental benefit, or exercise of the right to vote. Many durational requirements have been held unconstitutional when a fundamental right was impaired or a benefit withheld and the length of residence required was longer than is necessary to serve a compelling governmental interest. *See, e.g.*, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

4. Municipal residence requirements are not new. Some of the earliest-reported cases dealing with the application of the requirements are Fox v. McDonald, 101 Ala. 51, 13 So. 416 (1893), Johnson v. State *ex rel.* Davis, 132 Ala. 43, 31 So. 493 (1901), Hellyer v. Prendergast, 176 A.D. 383, 162 N.Y.S. 788 (1917). Said one commentator in 1914, after first decrying durational residence requirements, "Where . . . a non-resident has been selected for a more or less permanent office it seems reasonable . . . that he should become identified with the affairs of the city to the extent of taking up his residence there." N. MATTHEWS, MUNICIPAL CHARTERS 57 (1914; McGrath reprint 1969).

Trainor v. City of Newark, 137 N.J. Super. 570, 350 A.2d 83 (Ch. Div. 1975), *rev'd*, 145 N.J. Super. 466, 368 A.2d 381 (App. Div. 1976), *cert. denied*, 74 N.J. 255, 377 A.2d 661 (1977), relates the legal and political history of the Newark residence ordinance and describes the chaotic lobbying efforts by police and firemen on the day the New Jersey legislature exempted those two groups from all residence requirements. *Id.* at 586–87, 350 A.2d at 88–92.

quirements has in some jurisdictions led to referenda banning them, some by state constitutional provisions[5] and others by city charter amendments.[6] Elsewhere, municipalities continue to impose the requirements in jurisdictions where they were previously unknown.[7]

Typically, municipal residence requirements command that either all or certain classes of employees of the municipality maintain residence within the municipality[8] as a condition of employment.[9] Various modifying provisions may lessen the potential harshness of the requirements in a particular jurisdiction by making the requirement prospective only[10] or by adding waiver provisions,[11] a reasonable time to comply with the rule,[12] or an alternative to establishing residence.[13] At least one city has attempted to ensure compliance

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5. After the California Supreme Court upheld a municipal residence requirement in Ector v. City of Torrance, 10 Cal. 3d 129, 514 P.2d 433, 109 Cal. Rptr. 849 (1973), California voters amended the state constitution to limit a municipality's authority to impose residence requirements. The amendment provided: "A city or county . . . may not require that its employees be residents of any such city or county . . . except that such employees may be required to reside within a reasonable and specific distance of their place of employment or other designated location." CAL. CONST. art. XI, § 10(b); *see, e.g.*, Cooperrider v. San Francisco Civil Serv. Comm'n, 97 Cal. App. 3d 495, 158 Cal. Rptr. 801 (1979); Lanam v. Civil Serv. Comm'n, 80 Cal. App. 3d 315, 145 Cal. Rptr. 590 (1978). *See also* text accompanying notes 39–44 *infra*.

6. In 1967, Cleveland voters removed a residence requirement from that city's charter. City of Cleveland *ex rel.* Kay v. Riebe, 46 Ohio Misc. 47, 48, 348 N.E.2d 156, 158 (C.P. 1976). Cleveland later reinstated the requirement by ordinance. *But see* Chylik v. City of Cleveland, 59 Ohio App. 2d 305, 394 N.E.2d 1018 (1978) (residence requirement invalid owing to conflict with city charter).

7. *See, e.g.*, Jeske v. Upper Yoder Township, 44 Pa. Commw. Ct. 13, 403 A.2d 1010 (1979).

8. Other local authorities, such as counties, townships, and school districts, also impose residence requirements. Although this Comment deals primarily with municipalities, many of the arguments concerning the requirements' validity are the same regardless of the governmental unit involved.

9. In some states, the imposition of a residence requirement may violate a city's statutory duty to bargain collectively in good faith with a municipal employees union. Where the requirement is considered a condition of employment, failure to bargain may result in invalidity of the requirement. *See, e.g.*, City of New Haven v. Connecticut State Bd. of Labor Relations, 39 Conn. Supp. 18, 410 A.2d 140 (1979); Hayford and Durkee, *Residency Requirements in Local Government Employment: The Impact of the Public Employer's Duty to Bargain*, 29 LAB. L.J. 343 (1978). However, the protection afforded by such a duty may be short-lived if the municipality is allowed to bargain to an impasse and then, its duty to bargain met, proceed to adopt the requirement. *Id.* at 347. *See, e.g.*, Jeske v. Upper Yoder Township, 44 Pa. Commw. Ct. 13, 403 A.2d 1010 (1979).

10. CINCINNATI, OHIO, ADMINISTRATIVE CODE art. XVII, § 1 (1977), provides:

> All persons hereafter appointed to positions in the city service shall be residents of the city of Cincinnati at the time of their appointment and shall continue to maintain their primary place of residence within the city at all times during their continued service with the city.
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> All persons now holding positions in the city service and residing within the city shall continue to maintain their primary place of residence within the city at all times during their continued service with the city.
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> All persons now holding positions in the city service not residing within the city shall, if they change their primary place of residence, establish and maintain their primary place of residence within the city at all times thereafter during their continued service with the city.

This ordinance was upheld in Buckley v. City of Cincinnati, 63 Ohio St. 2d 42, 406 N.E.2d 1106 (1980).

11. *See, e.g.*, the waiver provision in the Newark residence requirement, note 2 *supra*. The special circumstances waiver was held invalid for want of adequate standards in Abrahams v. Civil Serv. Comm'n, 65 N.J. 61, 319 A.2d 483 (1974).

12. Blanchester, Ohio, Ordinance No. 350, § 2 (1965), provides: "All present officers of the Police Department . . . who are not residents of the Village of Blanchester, must become residents or establish their residence within two miles of said Village within six months of the effective date of this ordinance in order to continue to hold their said positions." This requirement was held valid in Quigley v. Village of Blanchester, 16 Ohio App. 2d 104, 242 N.E.2d 589 (1968).

13. Blanchester, Ohio, Ordinance No. 350, § 2 (1965), provides a geographical proximity alternative. *See* note 12 *supra*. *See also* text accompanying notes 39–44 *infra*. NEW YORK CITY CHARTER § 822-a (1976) provides:

by increasing the rule's harshness: a Cleveland, Ohio, ordinance imposes personal liability on administrators for any compensation paid to a nonresident who was hired "recklessly and without using reasonable diligence to ascertain the true facts concerning that person's bona fide place of residence."[14] Some residence ordinances specifically define "residence,"[15] while many others let courts decide what constitutes residence,[16] as well as the type of evidence required to gauge compliance.[17]

Proponents argue that residence requirements are vital to the preservation and improvement of the economy, safety, culture, and racial balance of declining urban centers.[18] The requirements, it is argued, not only improve job performance by providing employees a sense of identity with the communities they serve, but also bolster seriously threatened urban economies by recirculating a municipality's dollars within the city limits through taxes and spending.

Many employees have either sought to avoid application of the requirements to themselves[19] or attacked the requirements on constitutional or other grounds.[20] Most challengers have asserted that the residence requirements

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> [E]very person seeking employment with the city of New York or any of its agencies . . . shall sign an agreement as a condition precedent to such employment to the effect that if he is or becomes a nonresident . . . during his employment by the city, he will pay to the city an amount by which a city personal income tax on residents computed and determined as if he were a resident . . . exceeds the amount of any city earnings tax and city personal income tax imposed on him for the same taxable period.

This taxation alternative was upheld in Watts v. McGuire, 102 Misc. 2d 711, 424 N.Y.S.2d 327 (1979), and Legum v. Goldin, 99 Misc. 2d 654, 416 N.Y.S.2d 712 (1979).

14. CLEVELAND, OHIO, ADMINISTRATIVE CODE § 171.48. *But see* Chylik v. City of Cleveland, 59 Ohio App. 2d 305, 394 N.E.2d 1018 (1978) (ordinance invalid owing to conflict with city charter).

15. *See, e.g.*, the Newark residence requirement quoted in note 2 *supra*.

16. Mercadante v. City of Paterson, 111 N.J. Super. 35, 266 A.2d 611 (Ch. Div. 1970), *aff'd per curiam*, 58 N.J. 112, 275 A.2d 440 (1971) (employee must maintain "real and principal residence" within city); Contento v. Kohinke, 42 A.D.2d 1025, 348 N.Y.S.2d 392 (1973), *appeal denied*, 33 N.Y.2d 520, 353 N.Y.S.2d 1025 (1974) (municipal residence means "continual or at least extended physical presence at an abode within the town"); Goetz v. Borough of Zelienople, 14 Pa. Commw. Ct. 639, 324 A.2d 808 (1974) (ordinance requiring "full time residence" does not mean residing in one place "all the time").

17. Miller v. Police Bd., 38 Ill. App. 3d 894, 349 N.E.2d 544 (1976) (city must prove violation by manifest weight of the evidence); Choike v. City of Detroit, 94 Mich. App. 703, 290 N.W.2d 58 (1980) (city must prove violation by competent, material, and substantial evidence).

18. *See generally* Albert, *Residence Requirements*: McCarthy v. Philadelphia Civil Serv. Comm'n, 40B NAT'L INST. MUN. L. OFFICERS L. REV. 7 (1977); Hager, *Residency Requirements for City Employees: Important Incentives in Today's Urban Crisis*, 18 URB. L. ANN. 197 (1980).

19. *See, e.g.*, Ballf v. Public Welfare Dep't, 151 Cal. App. 2d 784, 312 P.2d 360 (1957), *cert. denied*, 355 U.S. 912 (1958); Denton v. City and County of San Francisco, 119 Cal. App. 2d 369, 260 P.2d 83 (1953); City of Newport v. Schindler, 449 S.W.2d 17 (Ky. 1969); Milton v. Department of Civil Serv., 71 N.J. Super. 135, 176 A.2d 492 (App. Div. 1961).

20. For a list of cases holding municipal residence requirements valid against federal constitutional challenges, see note 23 *infra*. Only three courts have held the requirements invalid on federal constitutional grounds. *See* note 21 *infra*.

Two states have invalidated municipal residence requirements on both federal and state constitutional grounds. In Fraternal Order of Police, Youngstown Lodge No. 28 v. Hunter, 36 Ohio Misc. 103, 303 N.E.2d 103 (C.P. 1973), a common pleas court held that enforcement of the Youngstown, Ohio, residence requirement against persons employed before the enactment of the requirement violated state retroactivity laws, as well as the contract clause (art. 1, § 10) of the United States Constitution, which prohibits state impairment of contract obligations. *Id.* at 105–06, 303 N.E.2d at 105. The court also held that the requirement was unconstitutional as applied prospectively because the city had introduced "no evidence of any kind from which the court could determine the reasonableness of the rule." *Id.* at 108, 303 N.E.2d at 106–07. An appeals court affirmed the

retroactivity holding but reversed in part the ruling on prospective application, declaring the requirement valid as applied to police but invalid as applied to a municipal airport employee. Fraternal Order of Police, Youngstown Lodge No. 28 v. Hunter, 49 Ohio App. 2d 185, 193–202, 360 N.E.2d 708, 712–18 (1975), *cert. denied*, 424 U.S. 977 (1976). *See* text accompanying notes 82–87 *infra*.

In Donnelly v. City of Manchester, 111 N.H. 50, 274 A.2d 789 (1971), the New Hampshire Supreme Court invalidated on both federal and state constitutional grounds a Manchester residence requirement imposed on school teachers. *See* text accompanying notes 67–71 *infra*. After the United States Supreme Court let stand a Philadelphia residence requirement for firemen, McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976), Manchester revived its residence requirement. In Angwin v. City of Manchester, 118 N.H. 336, 386 A.2d 1272 (1978), the New Hampshire Supreme Court made clear that its *Donnelly* decision had been based in part on state constitutional provisions and again held the requirement invalid: "We are not circumscribed by standards set forth in *McCarthy* if we grant individuals more rights than are called for by federal constitutional minima. . . . This we clearly have done." *Id.* at 337, 386 A.2d at 1273 (citations omitted).

Like New Hampshire, California affords its citizens greater protection than the federal constitution would require. A 1974 amendment to the California Constitution strictly limits a municipality's authority to impose residence requirements. *See* note 5 *supra*.

Other states have not been so protective. *See* Hattiesburg Firefighters Local 184 v. City of Hattiesburg, 263 So. 2d 767 (Miss. 1972) (municipal residence requirement does not violate state prohibition against ex post facto laws); Buckley v. City of Cincinnati, 63 Ohio St. 2d 42, 406 N.E.2d 1106 (1980) (ordinance that requires city employees who establish new residence to move within municipal limits not retroactive law); Jeske v. Upper Yoder Township, 44 Pa. Commw. Ct. 13, 403 A.2d 1010 (1979) (township residence requirement not retroactive condition of employment).

For decisions involving state authority grounds, see Cooper v. Green, 359 So. 2d 377 (Ala. 1978) (statute that forbids making residence a prerequisite to employment does not forbid imposition of requirement for officer); City of Atlanta v. Myers, 240 Ga. 261, 240 S.E.2d 60 (1977) (state statute prohibiting residence requirements does not violate state constitution); Harvey Firemens Ass'n v. City of Harvey, 54 Ill. App. 3d 21, 369 N.E.2d 288 (1977) (statute that grants municipality authority to impose residence requirement for applicants does not permit imposition of requirements on present employees); Wierenga v. Board of Fire and Police Comm'rs, 40 Ill. App. 3d 270, 352 N.E.2d 322 (1976) (board of commissioners lacked authority to impose residence requirements on present employees); Manion v. Kreml, 131 Ill. App. 2d 374, 264 N.E.2d 842 (1970) (civil service statute did not affect police board's authority to impose residence requirement); Brown v. City of Meridian, 370 So. 2d 1355 (Miss. 1979) (residence requirement invalid because not properly published and recorded in ordinance book); Mandelkern v. City of Buffalo, 64 A.D.2d 279, 409 N.Y.S.2d 881 (1978) (residence requirement does not conflict with civil service statutory provision limiting dismissal to grounds of incompetence or misconduct); Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971) (city charter provision that firemen must be eligible voters means voters in city election and, therefore, city residents); Chylik v. City of Cleveland, 59 Ohio App. 2d 305, 394 N.E.2d 1018 (1978) (repeal of city charter residence provision implies intent to limit city's authority to impose requirement); Bjorseth v. City of Seattle, 15 Wash. App. 797, 551 P.2d 1372 (1976), *modified on other grounds*, 17 Wash. App. 521, 563 P.2d 1320 (1977) (municipal system that provides for lay-offs of nonresidents before residents invalid under statutory ban on residence requirements).

When residence requirements have been adopted but not enforced, estoppel claims have been raised. *E.g.*, Lines v. City of Topeka, 223 Kan. 772, 577 P.2d 42 (1978) (city estopped from dismissing building inspector since commissioners had promised to forego enforcement of residence requirement until new ordinance defined "residence"); Municipal Civil Serv. Comm'n v. Myers, 348 So. 2d 1334 (La. App. 1977) (city not estopped from enforcement of residence requirement when delay caused by city's study of the requirement's constitutionality); Doris v. Police Comm'r, 374 Mass. 443, 373 N.E.2d 944 (1978) (lack of enforcement of residence requirement does not alone raise implied assurances necessary for estoppel claim); Loiselle v. City of East Providence, 116 R.I. 585, 359 A.2d 345 (1976) (city's failure to enforce residence requirement for two years does not support estoppel claim in case in which employee could not show detrimental reliance).

Several other cases involving residence requirements are worth noting: Cook County College Teachers Union Local 1600 v. Taylor, 432 F. Supp. 270 (N.D. Ill. 1977) (not violation of equal protection for city to provide $3000 hardship allowance for administrative personnel but not for other employees when both classes were forced to move residence to within city); Monti v. Flaherty, 351 F. Supp. 1136 (W.D. Pa. 1972) (an employee's remedy is limited to reinstatement after discharge without a hearing for violation of residence requirement); Plocher v. City of Highland, 59 Ill. App. 3d 697, 375 N.E.2d 1016 (1978) (employee who had been dismissed for failure to comply with unauthorized retroactive residence requirement reinstated and given damages equal to lost wages); City of Newport v. Schindler, 449 S.W.2d 17 (Ky. 1969) (declaratory judgment that police officer is not an "officer" not affected by state constitutional residence requirement imposed on "officers"); Michigan State Employees Ass'n v. Civil Serv. Comm'n, 91 Mich. App. 135, 283 N.W.2d 672 (1979) (valid for department of natural resources to require park manager to reside in assigned house in state park but invalid to charge rent); Grable v. City of Detroit, 48 Mich. App. 368, 210 N.W.2d 379 (1973) (civil service hearing officer required to consider personal hardship waiver to residence requirement); Buffet v. Municipal Civil Serv. Comm'n, 58 A.D.2d 362, 396 N.Y.S.2d 721 (1977), *aff'd mem.*, 45 N.Y.2d 1003, 413 N.Y.S.2d 147, 385 N.E.2d 1074 (1978) (court rejects residence requirement that was challenged by board of education on ground that

violate the equal protection clause of the United States Constitution because employment is permitted for a class of residents but denied to a class of nonresidents. A few courts[21] and most commentators[22] have agreed with the challengers, but the overwhelming majority of courts have upheld the requirements.[23]

Whether a constitutional challenge to the validity of a municipal residence requirement succeeds depends upon the level of scrutiny applied. Use of the deferential "rational basis test"[24] has, with one exception,[25] resulted in findings of validity.[26] Commentators have argued that application of the more demanding "strict scrutiny"[27] analysis should result in invalidation of the

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enough qualified teachers do not live within city); Kirkland v. Board of Educ., 49 A.D.2d 693, 370 N.Y.S.2d 761 (1975) (abuse of discretion for trial judge to refuse dismissed employee permission to intervene in declaratory action of which he had had no notice until after residence requirement upheld in summary judgment).

21. Hanson v. Unified School Dist. No. 500, 364 F. Supp. 330 (D. Kan. 1973); Donnelly v. City of Manchester, 111 N.H. 50, 274 A.2d 789 (1971); Fraternal Order of Police, Youngstown Lodge No. 28 v. Hunter, 49 Ohio App. 2d 185, 360 N.E.2d 708 (1975), *cert. denied*, 424 U.S. 977 (1976).

22. Kramer, *The Constitutionality of Post-Employment Residency Requirements*, 9 URB. LAW. 157 (1977); Comment, *The Constitutionality of Residency Requirements for Municipal Employees*, 24 EMORY L.J. 447 (1975); Note, *Residency Requirements for Municipal Employees: Denial of a Right to Commute?*, 7 U.S.F.L. REV. 508 (1973); Comment, *Municipal Employee Residence Requirements and the Right to Travel*, 1975 WASH. U.L.Q. 250; Note, *Municipal Employee Residency Requirements and Equal Protection*, 84 YALE L.J. 1684 (1975).

23. *E.g.*, McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976); Lorenz v. Logue, 611 F.2d 421 (2d Cir. 1979); Andre v. Board of Trustees, 561 F.2d 48 (7th Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); Wardwell v. Board of Educ., 529 F.2d 625 (6th Cir. 1976); Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975); Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256 (D. Conn. 1979); Krzewinski v. Kugler, 338 F. Supp. 492 (D.N.J. 1972); Ector v. City of Torrance, 10 Cal. 3d 129, 514 P.2d 433, 109 Cal. Rptr. 849 (1973), *cert. denied*, 415 U.S. 935 (1974); Detroit Police Officers Ass'n v. City of Detroit, 385 Mich. 519, 190 N.W.2d 97 (1971), *appeal dismissed for want of substantial federal question*, 405 U.S. 950 (1972); Choike v. City of Detroit, 94 Mich. App. 703, 290 N.W.2d 58 (1980); Guttu v. City of East Grand Forks, 294 N.W.2d 735 (Minn. 1980); Abrahams v. Civil Serv. Comm'n, 65 N.J. 61, 319 A.2d 483 (1974); Trainor v. City of Newark, 145 N.J. Super, 466, 368 A.2d 381 (App. Div. 1976) *cert. denied*, 74 N.J. 255, 377 A.2d 661 (1977); Mandelkern v. City of Buffalo, 64 A.D.2d 279, 409 N.Y.S.2d 881 (1978); Maines v. City of Greensboro, 300 N.C. 126, 265 S.E.2d 155 (1980); Buckley v. City of Cincinnati, 63 Ohio St. 2d 42, 406 N.E.2d 1106 (1980); City of Memphis v. IBEW Local 1288, 545 S.W.2d 98 (Tenn. 1976).

24. Traditionally, equal protection analysis employs either of two standards of review. The first, the "rational basis" or "rational relationship" test, is generally used to determine the validity of classifications created by economic or social welfare legislation. Such classifications are valid if they rationally or arguably relate to a legitimate function of government. Thus, a court will ask only whether it is conceivable that the classification bears a rational relationship to a permissible government end. As long as there is an arguable relationship, however remote, between the means and ends, a court will not invalidate the law. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 524 (1978). *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297 (1976); Dandridge v. Williams, 397 U.S. 471 (1970).

The second equal protection standard, "strict scrutiny," applies whenever the legislation at issue (1) impairs a person's exercise of a fundamental right guaranteed by the Constitution, or (2) distinguishes between persons on the basis of race or similarly "suspect" characteristics. Strict scrutiny requires that the classifications be necessary to serve a compelling governmental objective. This two-part test requires, first, a governmental end of sufficient importance to justify unequal treatment of the classes involved; and second, a showing that use of the classifications is the least drastic means available to serve those ends. If an alternative method of serving the governmental objective would less significantly impair the rights of persons affected, the challenged classifications will be held invalid. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 524 (1978). *See, e.g.*, Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Graham v. Richardson, 403 U.S. 365 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969).

25. Hanson v. Unified School Dist. No. 500, 364 F. Supp. 330 (D. Kan. 1973). *See* text accompanying notes 96–98 *infra*.

26. *See* text accompanying notes 32–62, 99–111 *infra*.

27. *See* note 24 *supra*.

requirements,[28] but as yet no court has applied such strict review.[29]

This Comment proposes that neither test adequately protects employees' rights or municipal interests. A person's interests in choosing a community and finding and maintaining employment merit constitutional protection. The importance of these interests should trigger a meaningful review that affords greater protection than would a rational basis test. Municipal residence requirements should be held valid only if they substantially further important governmental objectives.[30] Only when a close relationship exists between the nature of the employment and the employee's residence within the municipality can the requirements be constitutionally imposed.[31]

II. CONSTITUTIONAL CHALLENGES

A. *Early Cases—Application of the Rational Basis Test*

The earliest cases involving municipal residence requirements dealt primarily with application to a particular employee rather than with the constitutionality of the requirements.[32] Constitutional analysis was first applied to a residence requirement in 1959 in *Kennedy v. City of Newark*,[33] in which the New Jersey Supreme Court applied a rational basis test and upheld the validity of the requirement. The challenge was based on a provision of the state constitution guaranteeing that "[a]ll persons are by nature free and independent and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property . . . ."[34] The employees contended that the provision protected a right to live where one chose without suffering loss of public employment. The court held that the requirements rationally furthered the legitimate governmental objectives of advancing the economy through increased tax revenues and encouraging better job performance by increasing an employee's stake in the future of the city.[35] The court framed the issue as "not whether a man is free to live where he will. Rather the question is whether he may live where he wishes and at the same time insist upon employment by government."[36] The *Kennedy* court thus based its result on the belief that

28. Kramer, *The Constitutionality of Post-Employment Residency Requirements*, 9 URB. LAW. 157 (1977); Comment, *The Constitutionality of Residency Requirements for Municipal Employees*, 24 EMORY L.J. 447 (1975); Note, *Residency Requirements for Municipal Employees: Denial of a Right to Commute?*, 7 U.S.F.L. REV. 508 (1973); Comment, *Municipal Employee Residence Requirements and the Right to Travel*, 1975 WASH. U.L.Q. 250.

29. Although some courts have required a showing of a compelling interest in the requirements, none has yet examined the narrowness of the means, the second step in strict scrutiny analysis. *See* note 79 and text accompanying notes 79–81 *infra*.

30. *See* text accompanying notes 141–77 *infra*.

31. *See* text accompanying notes 178–222 *infra*.

32. *See* note 4 *supra*.

33. 29 N.J. 178, 148 A.2d 473 (1959).

34. N.J. CONST. art. I, § 1.

35. 29 N.J. 178, 184, 148 A.2d 473, 476 (1959).

36. *Id.* at 183, 148 A.2d at 476.

public employment is a privilege, not a right.[37] Several courts have since rejected this approach.[38]

A year later in *Marabuto v. Town of Emeryville*[39] police and firemen argued that residence could not be a qualification for employment because it bore no reasonable relation to the performance of official duties. Although the California appeals court did not identify the challenge as a constitutional one, it applied a rational basis test[40] and held the requirement reasonably related to ensuring that police and firemen could respond quickly to emergencies.[41]

Emergency availability of safety personnel has served as justification for municipal residence requirements in a number of cases, regardless of the level of scrutiny employed.[42] It has been suggested that a municipality's need for readily available personnel would be better served by a geographical proximity requirement, one that directs an employee to reside within a specified number of miles from his place of duty.[43] Although no court has found this alternative mandated by the federal constitution, at least one state constitution has limited municipalities to use of geographical proximity requirements.[44]

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37. *Accord*, Berg v. City of Minneapolis, 274 Minn. 277, 143 N.W.2d 200 (1966); Mercadante v. City of Paterson, 111 N.J. Super. 35, 266 A.2d 611 (Ch. Div. 1970), *aff'd per curiam*, 58 N.J. 112, 275 A.2d 440 (1971).

38. In Graham v. Richardson, 403 U.S. 365 (1971), the United States Supreme Court declared "[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Id.* at 374 (citations omitted). In Krzewinski v. Kugler, 338 F. Supp. 492 (D.N.J. 1972), a municipal residence requirement survived a "compelling interest" test; however, the court specifically rejected the *Kennedy* court's reliance on right/privilege distinctions as justification for residence requirements: "The New Jersey courts have relied upon this right-privilege doctrine . . . to uphold state laws and municipal ordinances requiring public servants to reside in the municipality which pays their salaries. [citing *Kennedy and Mercadante*] . . . Any reliance upon [this] outdated, and apparently unconstitutional [theory] is disavowed by this court." *Id.* at 499 n.4 (citations omitted). *Accord*, Hanson v. Unified School Dist. No. 500, 364 F. Supp. 330 (D. Kan. 1973); Donnelly v. City of Manchester, 111 N.H. 50, 274 A.2d 789 (1971). The Supreme Court has consistently held that government cannot impair the exercise of a constitutionally protected activity by imposition of conditions on employment. *See* Garrity v. New Jersey, 385 U.S. 493 (1967) (invalid to use threat of dismissal to obtain self-incriminating statements from police officers); Sherbert v. Verner, 374 U.S. 398 (1963) (state cannot deny unemployment benefits to sabbatarian who is unwilling because of religious scruples to accept offered Saturday employment). *See also* Hager, *Residency Requirements for City Employees: Important Incentives in Today's Urban Crisis*, 18 URB. L. ANN. 197, 206–07 (1980); Note, *Residency Requirements for Municipal Employees: Denial of a Right to Commute?*, 7 U.S.F.L. REV. 508, 523–26 (1973).

39. 183 Cal. App. 2d 406, 6 Cal. Rptr. 690 (1960).

40. Use of the rational basis test is not limited to issues of equal protection. A similar test is employed to test the validity of municipal ordinances: a municipality is presumed to have no state authority to pass unreasonable laws. *See generally* 5 E. MCQUILLIN, MUNICIPAL CORPORATIONS 333–400 (1969 & Supp. 1979).

41. 183 Cal. App. 2d 406, 410–11, 6 Cal. Rptr. 690, 692–93 (1960).

42. *E.g.*, Detroit Police Officers Ass'n v. City of Detroit, 385 Mich. 519, 190 N.W.2d 97 (1971), *appeal dismissed for want of a substantial federal question*, 405 U.S. 950 (1972); Quigley v. Village of Blanchester, 16 Ohio App. 2d 104, 242 N.E.2d 589 (1968).

43. Note, *Residency Requirements for Municipal Employees: Denial of a Right to Commute?*, 7 U.S.F.L. REV. 508, 535–36 (1973).

44. *See* note 5 *supra*. An Ohio appeals court discussed the advisability of measuring the extent of a proximity requirement by time, rather than miles, in Fraternal Order of Police, Youngstown Lodge No. 28 v. Hunter, 49 Ohio App. 2d 185, 200–01, 360 N.E.2d 708, 717–18 (1975), *cert. denied*, 424 U.S. 977 (1976). A statutory geographical proximity requirement survived an equal protection challenge in Doris v. Police Comm'n, 374 Mass. 443, 373 N.E.2d 944 (1978). *See also* Burke v. Chief of Police, 374 Mass. 450, 373 N.E.2d 949 (1978) (measurement of ten mile radius geographical proximity requirement by "air miles" rather than "highway miles").

In 1961 the Supreme Court of Michigan in *State, County, and Municipal Employees Local 339 v. City of Highland Park*[45] avoided questioning the validity of a municipal residence requirement itself by holding that the questioned requirement's enforcement was unconstitutional owing to local housing conditions that made compliance a severe hardship. The ordinance required all municipal employees to establish residence within Highland Park within ninety days. Most of the 163 nonresident plaintiffs were low-income hospital workers. Noting that the city, a largely industrial area, could not adequately provide affordable housing for all the nonresidents, the court determined that application of the requirement in this instance was arbitrary and unreasonable, regardless of whether the requirement itself was valid.[46]

In 1969 in *Salt Lake City Firefighters Local 1645 v. Salt Lake City*[47] firemen challenged an ordinance that (1) required new applicants for employment to be residents; (2) imposed a continuing residence requirement on current employees who were already residents; and (3) required that current employees who lived outside a fifteen-mile radius from downtown move into the city within two years. The Utah Supreme Court held that the geographical proximity requirement reasonably served the purpose of making residence requirements for all city employees uniform.[48] The court also outlined a "public coffer" theory for economic justification of the requirements, finding that the ordinance was reasonable "not only for the city's convenience and economical operation, but conceivably to have those whom it helps clothe and feed participate in and contribute support and taxes for its benefit,—not for that of cities elsewhere."[49] This public coffer theory suggests that an employee's salary ought to circulate within the economy of the municipality that provides that salary, thus limiting to residents the benefit of the municipality's funds.[50] Several courts have since expressly rejected the public coffer theory as justification for municipal residence requirements.[51]

Both substantive due process and equal protection challenges to a residence requirement failed in 1970 in *Williams v. Civil Service Commission of Detroit*,[52] in which the Michigan Supreme Court approved a lower court's use of a reasonableness standard to test the requirements on both constitutional grounds. The lower court had found reasonable the belief that "local residence tends to make a person a better municipal employee" and that "the encouragement of local citizen service in municipal government is a desirable end in itself."[53]

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45. 363 Mich. 79, 108 N.W.2d 898 (1961).

46. *Id.* at 86–87, 108 N.W.2d at 901.

47. 22 Utah 2d 115, 449 P.2d 239 (1969).

48. *Id.* at 117, 449 P.2d at 240. *See* text accompanying notes 39–44 *supra.*

49. 22 Utah 2d 115, 117, 449 P.2d 239, 240 (1969).

50. *See* People v. Crane, 214 N.Y. 154, 108 N.E. 427, *aff'd sub nom.* Crane v. New York, 239 U.S. 195 (1915).

51. Krzewinski v. Kugler, 338 F. Supp. 492, 498 n.4 (D.N.J. 1973); Donnelly v. City of Manchester, 111 N.H. 50, 274 A.2d 789 (1971). *See* text accompanying note 74 *infra.*

52. 383 Mich. 507, 176 N.W.2d 593 (1970).

53. *Id.* at 514–15, 176 N.W.2d at 596.

One year later in *Detroit Police Officers Association v. City of Detroit*[54] the Michigan Supreme Court again applied a rational basis test and held valid an ordinance that imposed a residence requirement on all employees but excluded police from certain waiver provisions.[55] The court said that the distinction between police and other employees not only bore a reasonable relationship to permissible government ends, but also was legitimately based on "natural distinguishing characteristics" of the police officer's job.[56] The court noted the importance of a good relationship between the police and the communities they serve, as well as the importance of a policeman's availability for emergency duty.[57] One justice also recognized in the requirement a permissible attempt to reduce the racial tensions engendered in part by the hiring of police from predominantly white suburbs to patrol largely black Detroit neighborhoods, saying the requirement could serve to increase the number of black policemen and "promote a feeling of trust, confidence, and fraternity between the people of Detroit and their police department."[58]

Detroit Police Officers Association was appealed to the United States Supreme Court, which in 1972 dismissed the appeal for want of a substantial federal question.[59] Later that year the Seventh Circuit Court of Appeals in *Ahern v. Murphy*[60] dealt with a policeman's challenge to a Chicago municipal residence requirement but limited arguments to "whether the United States Supreme Court's dismissal of the appeal [of *Detroit Police Officers Association*] was dispositive of this appeal or merely persuasive."[61] The Seventh Circuit held that the Supreme Court's dismissal was a "decision on the merits of the case appealed"—that is, "fully equivalent to affirmance"—and, therefore, affirmed dismissal of the Chicago policeman's complaint.[62]

B. *Right of Travel Cases—Application of the Compelling Interest Test*

After the United States Supreme Court in *Shapiro v. Thompson*[63] recognized a constitutional right of travel, many challengers demanded that courts

54. 385 Mich. 519, 190 N.W.2d 97 (1971), *appeal dismissed for want of substantial federal question*, 405 U.S. 950 (1972).

55. *Id.* at 523, 190 N.W.2d at 97–98. Although discrimination in the waiver provisions for the two classes of employees was at issue, the Michigan Supreme Court's opinion and the United States Supreme Court's subsequent dismissal of appeal for want of a substantial federal question have been cited by courts and commentators alike as authority for the validity of the requirements themselves. *See* McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976); Wardwell v. Board of Educ., 529 F.2d 625 (6th Cir. 1976); Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975); Ahern v. Murphy, 457 F.2d 363 (7th Cir. 1972); Ector v. City of Torrance, 10 Cal. 3d 129, 514 P.2d 433, 109 Cal. Rptr. 849 (1973); Abrahams v. Civil Serv. Comm'n, 65 N.J. 61, 319 A.2d 483 (1974); Hager, *Residency Requirements for City Employees: Important Incentives in Today's Urban Crisis*, 18 URB. L. ANN. 197 (1980); Comment, *The Constitutionality of Residency Requirements for Municipal Employees*, 24 EMORY L.J. 447 (1975).

56. 385 Mich. 519, 522, 190 N.W.2d 97, 97 (1971).

57. *Id.* at 522–23, 190 N.W.2d at 97–98.

58. *Id.* at 524, 190 N.W.2d at 98 (Brennan, J., concurring).

59. 405 U.S. 950 (1972).

60. 457 F.2d 363 (7th Cir. 1972).

61. *Id.* at 364.

62. *Id.* (citations omitted).

63. 394 U.S. 618 (1969).

invoke strict scrutiny analysis for review of municipal residence requirements. *Shapiro* had held invalid three statutes that denied welfare benefits to persons who had resided in a jurisdiction for less than one year. The Court used a "compelling interest" standard for equal protection challenges to legislation that impairs a fundamental right, holding that such classifications are invalid unless they are "necessary to promote a compelling governmental interest."[64] The compelling interest test of *Shapiro* is indistinguishable from the strict scrutiny traditionally reserved for suspect classifications. Either test requires two findings: (1) that the legislation is designed to serve a very important governmental objective and (2) that the means chosen are the least drastic method of serving that objective.[65] Because *Shapiro* had invalidated a durational residence requirement for welfare benefits on the basis of the requirement's effect on the fundamental right of travel, many challengers to municipal residence requirements sought to apply the compelling interest standard to ordinances that impaired travel between home and employment.[66]

In 1971 in *Donnelly v. City of Manchester*[67] the Supreme Court of New Hampshire announced that the compelling interest standard was the appropriate test for a municipal residence case but applied a balancing test rather than *Shapiro*'s two-step strict scrutiny analysis. Having determined that "[t]he right of every citizen to live where he chooses and to travel freely not only within the state but across its borders is a fundamental right . . . guaranteed" by the New Hampshire and federal constitutions,[68] the court weighed the residence requirement's public benefit against the seriousness of the fundamental right's impairment.[69] The court found that no governmental interest would justify imposing the requirement on a school teacher but left unanswered the question of whether a residence requirement could be valid for other employees.[70] Economic justifications were expressly rejected.[71]

One year later in *Krzewinski v. Kugler*[72] a three-judge federal district court reviewed a New Jersey statute that imposed a municipal residence requirement on police and firemen and held that although the *Shapiro* compelling interest test applied, compelling governmental objectives did exist to

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64. *Id.* at 634.

65. *See* note 24 *supra.*

66. The notion of the right of travel has been questioned recently in Berger, *Residence Requirements for Welfare and Voting: A Post-Mortem*, 42 OHIO ST. L.J. 853 (1981).

67. 111 N.H. 50, 274 A.2d 789 (1971).

68. *Id.* at 51, 274 A.2d at 791.

69. *Id.*

70. *Id.* at 52, 274 A.2d at 791.

71. *Id.* at 52–53, 274 A.2d at 791–92. The court stated:

> It has been argued that those who are employed by the city should help support the cost of their employment by contributing to the economy of the city and to its tax base. But employees of the city earn their salaries, and any governmental interest in compelling them to be residents for whatever financial benefit there may be to the city . . . is slight compared to the important interference with their private rights.

Id.

72. 338 F. Supp. 492 (D.N.J. 1972).

justify burdening the employee's right of travel. The court said it would uphold the statute "only if the state is able to demonstrate a compelling interest in maintaining the difference in treatment between the classes"[73] and then summarily rejected the public coffer theory and right/privilege distinction justifications as being not only less than compelling, but unconstitutional in themselves.[74]

However, the *Krzewinski* court found compelling the municipality's interest in addressing the "modern pattern of urban disruption and dissipation prevalant [*sic*] today."[75] The court held that the requirements were part of justifiable efforts to engender in the police officers a personal commitment to the city's future, to dispel the prejudices of citizens and police, and to avoid the appearance that outsiders were brought into the city to impose law and order on its poor and minority residents.[76] The court further noted that a resident policeman is more often present within the city during his off-duty time and, therefore, more readily available to assume duty when an emergency or a "chance observation" requires official action.[77] The court found no important differences between police and firemen that would serve to exempt the latter from the requirements.[78]

Krzewinski requires a showing of compelling government interests, but the test differs from that applied in *Shapiro*. Although the *Krzewinski* court identified compelling interests, the means were not examined under *Shapiro*'s requirement that they be the least drastic method available to serve those interests. Rather, the court applied a balancing test akin to that used in *Donnelly* and concluded that the need for municipal employees with a sense of community identity and a presence within the city for emergencies outweighed the employees' interest in their fundamental right of travel.[79] The community identity objective could have been served by less drastic means—for example, participation in educational programs or community affairs and organizations. Emergency availability is best served by a geographical proximity requirement based on travel time to job.[80] Nevertheless, no more precise means exist to assure a presence to make "chance observations"; such an immediate service to the city must by the terms of the objective be an incident of residence. However, the *Krzewinski* court did not discuss in any

73. *Id.* at 497.

74. The court noted that *Shapiro* had expressly rejected the theory that a municipality may preserve its funds for its own residents. After describing the public coffer theory as a "natural outgrowth" of viewing public employment as a privilege rather than a right, the court made clear its disapproval: "Any reliance upon these outdated, and apparently unconstitutional theories is disavowed by this Court." *Id.* at 499 n.4. *See* text accompanying notes 49–51 *supra*.

75. 338 F. Supp. 492, 499 (D.N.J. 1972).

76. *Id.* at 499–500.

77. *Id.* at 500.

78. *Id.* at 500–01.

79. Language in the *Krzewinski* court's discussion indicates that it believed the Court in *Shapiro* had applied something of a balancing test: "In [*Shapiro*] the state interest lay in determining bona fide residency, an interest *clearly outweighed* by Shapiro's need for welfare payments. . . ." *Id.* at 502 (emphasis added).

80. *See* text accompanying notes 39–44 *supra*.

detail these distinctions among means, and it seems unlikely that the court was engaged in an implied scrutiny of the means. *Donnelly* and *Krzewinski* are consistent in one additional respect: both courts determined the outcome of the balance by considering the particular characteristics of the affected employees' duties.[81]

In *Fraternal Order of Police, Youngstown Lodge No. 28 v. Hunter*[82] an Ohio appeals court found the *Krzewinski* test appropriate and held a Youngstown residence requirement valid as applied prospectively to police.[83] A lower court had held the requirement invalid because the city had produced "no evidence of any kind from which the court could determine the reasonableness of this rule."[84] The appeals court agreed that "there is absolutely nothing in the record" to demonstrate what compelling interests existed[85] but nevertheless "[took] judicial notice that there is a compelling reason to require safety personnel to reside within the proximity to their duty station."[86] However, the appellate court further noted that for other employees there must be an established factual basis to support a conclusion that compelling interests are served by a residence requirement and consequently held invalid the application of the Youngstown requirement to a municipal airport employee whose residence outside the city was closer to the airport than it would have been had he resided in Youngstown.[87]

C. *Limits to the Right of Travel Analysis—The Rational Basis Standard*

Despite the use of the compelling interest test in these cases, most courts continue to apply the rational basis test.[88] Justification for the return to the lesser standard is said to lie in two other right of travel cases, *Dunn v. Blumstein*[89] and *Memorial Hospital v. Maricopa County*.[90] In *Dunn* the Supreme Court invalidated a durational residence requirement for voting in local elections. The Court held that a one-year waiting period was not the least restrictive means of serving Tennessee's compelling interest in the prevention of voter fraud.[91] In dictum, the Court cautioned that it intended to cast no doubt on the validity of a requirement that a voter be a resident at the time of an election.[92] In *Memorial Hospital* the Court again employed strict scrutiny and held invalid an Arizona statute that imposed a one-year resi-

81. *See* text accompanying notes 193–202 *infra*.
82. 49 Ohio App. 2d 185, 360 N.E.2d 708 (1975), *cert. denied*, 424 U.S. 977 (1976).
83. *Id.* at 199–200, 360 N.E.2d at 716–17.
84. 36 Ohio Misc. 103, 108, 303 N.E.2d 103, 106–07 (1973), *rev'd in part*, 49 Ohio App. 2d 185, 360 N.E.2d 708 (1975), *cert. denied*, 424 U.S. 977 (1976).
85. 49 Ohio App. 2d 185, 198–99, 360 N.E.2d 708, 716–17 (1975).
86. *Id.* at 200, 360 N.E.2d at 717.
87. *Id.* at 201–02, 360 N.E.2d at 718.
88. *See, e.g.*, cases cited in note 23 *supra*.
89. 405 U.S. 330 (1972).
90. 415 U.S. 250 (1974).
91. 405 U.S. 330, 353 (1972).
92. *Id.* at 342 n.13.

dence requirement on an indigent's receipt of free, nonemergency medical care or hospitalization.[93] Justice Marshall's majority opinion echoed *Dunn*'s caveat limiting right of travel analysis to durational requirements and further explained that the fundamental right protected was not a right of movement, but of migration: "Even a bona fide residence requirement would burden the right of travel, if travel meant merely movement."[94] Marshall pointed out that the fundamental right concerned only a person's movement "to migrate, resettle, find a new job, and start a new life."[95]

In *Hanson v. Unified School District No. 500*,[96] decided in the interval between the *Dunn* and *Memorial Hospital* opinions, a federal district court took note of the *Dunn* caveat but did not decide whether a residence requirement imposed on school teachers impaired any fundamental right that would justify use of a compelling interest test.[97] Rather, the court held that the requirement was invalid under either equal protection standard "because the classification of residents versus non-residents . . . is essentially arbitrary and does not rest upon any reasonable basis."[98]

After *Memorial Hospital* two federal courts of appeals approved evaluation of municipal residence requirements by a rational basis test.[99] In 1975 in *Wright v. City of Jackson*[100] the Fifth Circuit rejected firemen's claims that a local residence requirement violated their fundamental travel rights. The Fifth Circuit noted the *Dunn* and *Memorial Hospital* limitations on right of travel analysis. The court also drew a distinction between travel *intra*state and *inter*state and held that only the latter was protected by a compelling interest standard.[101] The *Wright* opinion also took note of the Seventh Circuit's interpretation of the Supreme Court's dismissal of *Detroit Police Officers Association*.[102] All of these reasons, the Fifth Circuit declared, justified a return to evaluation of municipal residence requirements by the lower standard.[103] In 1976 in *Wardwell v. Board of Education*[104] the Sixth Circuit echoed the *Wright* court's analysis and denied a school teacher's request that the court enjoin enforcement of a Cincinnati residence requirement.[105] The court applied a rational basis test and found the requirement rationally related to improvement of teachers' community identity and involvement.[106]

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93. 415 U.S. 250, 269 (1974).

94. *Id.* at 255.

95. *Id.* (quoting Shapiro v. Thompson, 394 U.S. 618, 629 (1969)).

96. 364 F. Supp. 330 (D. Kan. 1973).

97. *Id.* at 333–34.

98. *Id.* at 334.

99. Wardwell v. Board of Educ., 529 F.2d 625 (6th Cir. 1976); Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975).

100. 506 F.2d 900 (5th Cir. 1975).

101. *Id.* at 902.

102. *Id.* at 903 (citing Ahern v. Murphy, 457 F.2d 363 (7th Cir. 1972), as interpreting the Supreme Court's dismissal of *Detroit Police Officers Ass'n v. City of Detroit* for want of a substantial federal question as a decision on the merits). *See also* text accompanying notes 59–62 *supra*.

103. 506 F.2d 900, 903 (5th Cir. 1975).

104. 529 F.2d 625 (6th Cir. 1976).

105. *Id.* at 627–28.

106. *Id.* at 628.

In 1976 the Supreme Court seemingly approved the return to a rational basis test in *McCarthy v. Philadelphia Civil Service Commission*,[107] a brief per curiam opinion announcing a decision based on jurisdictional statements alone. McCarthy, a sixteen-year veteran of the Philadelphia Fire Department, was dismissed for violation of a residence requirement. Slightly more than one year before his dismissal, McCarthy's wife had moved with their children to the family's summer home in New Jersey to avoid neighborhood violence that had resulted in beatings of their children.[108] Several months later, because of vandalism, McCarthy sold the Philadelphia house and moved into his mother's house, also in Philadelphia.[109] Although he voted, received mail, and stayed two nights a week at his mother's house, the Philadelphia Civil Service Commission determined that because his family resided in New Jersey, McCarthy resided there also.[110] A commonwealth court sustained his dismissal, the Pennsylvania Supreme Court denied review, and McCarthy appealed to the Supreme Court.[111]

The Court did not explicitly identify any standard of review but did imply that its earlier dismissal of *Detroit Police Officers Association* could be considered a holding that "this kind of ordinance is not irrational."[112] It cited as further support the Sixth Circuit's *Wardwell* opinion.[113] The Court noted that it had yet to address the question of whether such a residence requirement impaired the right of travel as defined in *Shapiro*, *Dunn*, and *Memorial Hospital* and said:

> Each of those cases involved a statutory requirement of residence in the state for at least one year before becoming eligible either to vote, as in *Dunn*, or to receive welfare benefits, as in *Shapiro* and *Memorial Hospital*. Neither in those cases, nor in any others, have we questioned the validity of a condition placed upon municipal employment that a person be a resident *at the time* of his application. In this case appellant claims a constitutional right to be employed by the city of Philadelphia *while* he is living elsewhere. There is no support in our cases for such a claim.[114]

The opinion went on to quote *Dunn*'s distinction between durational requirements and "appropriately defined and uniformly applied bona fide residence requirements" and concluded that the Philadelphia ordinance was of the latter kind.[115]

In *McCarthy* the Court established the validity of municipal residence requirements by doing little more than announcing that it had never ques-

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107. 424 U.S. 645 (1976) (per curiam).

108. Jurisdictional Statement at 6, McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976).

109. *Id.*

110. Appellee's Motion to Dismiss at 3, McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976).

111. 424 U.S. 645, 645 (1976).

112. *Id.* at 646 (citations omitted).

113. *Id.* (citing Wardwell v. Board of Educ., 529 F.2d 625 (6th Cir. 1976)).

114. *Id.* at 646–47 (footnotes omitted).

115. *Id.* at 647. Chief Justice Burger and Justices Brennan and Blackmun would have noted probable jurisdiction and set the case for argument. *Id.*

tioned their validity before. The opinion approved one city's requirement without clearly articulating a standard or showing how that standard applied to the terms of the ordinance. It implied a rational basis test by noting that the requirement was "not irrational" but named no legitimate purposes that were rationally furthered. At most, the Court implicitly announced three prerequisites to validity—that the requirements be "appropriately defined," "uniformly applied," and "bona fide"—without hinting at their meanings. "Uniform application" could mean that the requirement must burden equally all city employees or merely all firemen. "Appropriate definition" may require that ordinances be especially precise or simply not unusually vague. What meaning "bona fide" may have apart from "valid" is difficult to ascertain, unless perhaps the Court intended to prohibit informally adopted requirements but to allow those imposed according to official legislative procedures.[116] Such a prerequisite would lessen an administrator's opportunity to use violation of a residence requirement as a pretext for dismissal of an unpopular or politically threatening employee.[117]

However, despite its shortcomings in failing to identify the appropriate standard of review, the *McCarthy* opinion does resolve one issue: if any right is impaired by a municipal residence requirement, it is not the fundamental right of travel. Lower courts have held this to be its clear import. Although employees continue to challenge the requirements on federal right of travel grounds, since 1976, the courts that have directly addressed those grounds have rejected them on the basis of *McCarthy*.[118]

The Court's assertion that the fundamental right of travel is not impaired by a municipal residence requirement is correct for two reasons. First, the right of travel protects a person's interest in pulling up stakes, starting anew, and leaving life in one place for life in another; it is a migration right, and as such offers no support to an emigrant's expectation of taking his job along with him. As applied to restrictions on employment, the right of travel should protect a person's right to apply for and begin a job in the place he chooses. A municipal residence requirement does nothing to impair that right; unless the requirement has a durational element, it imposes no special hardship on a person's finding a city offering employment and his moving there to qualify for a job.[119]

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116. A municipality possesses only such power as is delegated to it by state government. Unless it is specifically authorized to impose a residence requirement or unless broad powers to set qualifications are granted, a municipality may violate state constitutional provisions or the municipality's enabling legislation if it requires its employees to maintain or establish residence within the city. *See, e.g.*, City of Atlanta v. Myers, 240 Ga. 261, 240 S.E.2d 60 (1977); Manion v. Kreml, 131 Ill. App. 2d 374, 264 N.E.2d 842 (1970); Mandelkern v. City of Buffalo, 64 A.D.2d 279, 409 N.Y.S.2d 881 (1978). A municipality's failure to follow legislatively mandated procedure in publishing and recording a residence ordinance may also invalidate the requirement. *See* Brown v. City of Meridian, 370 So. 2d 1355 (Miss. 1979).

117. *See* Elrod v. Burns, 427 U.S. 347 (1976).

118. *See, e.g.*, Lorenz v. Logue, 611 F.2d 421 (2d Cir. 1979); Andre v. Board of Trustees, 561 F.2d 48 (7th Cir. 1977); Buckley v. City of Cincinnati, 63 Ohio St. 2d 42, 406 N.E.2d 1106 (1980).

119. There is even less burden in a jurisdiction that allows a reasonable time *after* beginning employment in which to comply with the requirement. See, for example, the Blanchester ordinance cited in note 12 *supra*.

Second, even if the right of travel is affected, strict scrutiny applies only if the requirement impairs the exercise of another fundamental right, such as voting,[120] or penalizes migration by denying a "necessity of life."[121] Thus, absent a high degree of burden or penalty, the impairment of the right is not severe enough to trigger the stricter standard. To date, the Court has not extended the protection afforded necessities beyond welfare benefits; no cases appear to hold public employment such a necessity.[122] Therefore, the Court has correctly withheld strict scrutiny analysis. Regardless of whether *McCarthy* held that a municipal residence requirement penalizes migration too little or not at all, either holding presents a valid reason for denying an employee or a nonresident the benefit of the *Shapiro* standard.

The Court's rejection of the right of travel claim does not, however, provide a satisfactory resolution to the issue of the Philadelphia requirement's validity, for the Court failed to discuss whether other important personal interests were impaired. Several of the Court's decisions have accorded significant personal interests more meaningful protection than a traditional rational basis test would offer.[123] In *McCarthy* the Court did not discuss, and the parties did not argue, the existence of other fundamental or significant rights or the application of an intermediate standard of review. Careful analysis of existing cases reveals two such important rights, as well as a standard that offers them meaningful protection.

III. THE RIGHTS IMPAIRED

Unlike a toll[124] or an immigration restriction,[125] a municipal residence requirement affects one's right of travel only indirectly; it does not halt a person's actual freedom of movement between a city and its suburbs. What most likely lies at the heart of an employee's complaint is the imposition of an unfair choice: a municipal employee must decide whether he values more highly his job or his home.[126] If he chooses to protect his job, he loses the right to continue residing not only in a particular house, but in a preferred neighborhood as well—often among friends and family, and close to a church, schools,

120. Dunn v. Blumstein, 405 U.S. 330 (1972).

121. Memorial Hospital v. Maricopa County, 415 U.S. 250, 254 (1974).

122. Several cases do indicate that more demanding scrutiny will apply when conditions placed on employment affect an employee's exercise of first or fifth amendment rights. *See* Elrod v. Burns, 427 U.S. 347 (1976); Lefkowitz v. Turley, 414 U.S. 70 (1973); Garrity v. New Jersey, 385 U.S. 493 (1967); Greene v. McElroy, 360 U.S. 474 (1959). *See also* Craig v. Boren, 429 U.S. 190 (1976).

123. *See* text accompanying notes 139–51 *infra*.

124. Justice Rehnquist's lone dissenting opinion in *Memorial Hospital* noted: "[T]he toll exacted from persons crossing from Delaware to New Jersey by the Delaware Memorial Bridge is a 'penalty' on interstate travel in the most literal sense of all. But such charges . . . have been upheld by this Court against attacks based upon the right to travel." 415 U.S. 250, 284 (1974) (footnote omitted).

125. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1 (1965) (valid for federal government to prohibit citizens from traveling to Cuba).

126. In Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975), a group of nonresident firemen brought a class action challenging the validity of a Jackson, Mississippi, residence requirement. The plaintiffs alleged that "the ordinance denies them their right to travel, their right to choose a residence, or, in the alternative, their right to employment . . . ." *Id.* at 901.

and associations in whose affairs he is involved. If he chooses instead to protect his choice of community, he must forego an opportunity to seek or maintain preferred employment.

A broad reading of *McCarthy* suggests that the Supreme Court has rejected the existence of any fundamental right, even apart from the right of travel, to continue holding a job while living in the neighborhood of one's choice.[127] The Court's statement that "[t]here is no support in our cases for such a claim" could rule out all possible claims to constitutional protection, if by "our cases" the Court refers to *all* its decisions. A fundamental right is by definition so important that a majority of Justices should seldom fail to recognize its impairment.[128] It is quite possible that in *McCarthy* the Court considered all other rights that might be deemed fundamental and found none impaired. But it is also possible that "our cases" referred only to the right of travel cases that the Court cited. Because *McCarthy* was decided without benefit of briefs or arguments, fundamental rights other than the right of travel were perhaps not fully considered.

There is only slight utility in arguing that a fundamental right exists. Although the Court has identified several fundamental rights,[129] the Justices have not agreed on where these rights can be found. In perhaps the most thoroughly explained fundamental rights case, *Griswold v. Connecticut*,[130] Justice Douglas' majority opinion found a fundamental right of privacy in the "penumbras" of several Bill of Rights guarantees sufficient to invalidate a statute that made the use of contraceptives a crime.[131] Unfortunately, he failed to explain precisely how the right was located.[132] In a concurring opinion, Justice Goldberg noted that the ninth amendment[133] created no rights but did authorize the Court to identify others not expressly named in the Constitution.[134] He further suggested that federal judges look for fundamental rights, not in their personal beliefs, but in the traditions and conscience of the American people.[135] Justice Harlan, also concurring, indicated that the due process clause of the fourteenth amendment protects "basic values 'implicit in the concept of ordered liberty.'"[136] Later cases have added little to these vague explanations of where and how the Court has identified fundamental

127. *See* quotation in text accompanying note 114 *supra*.

128. *See* text accompanying notes 129–39 *infra*.

129. The Court has identified the following fundamental rights: freedom of association, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); freedom of participation in the electoral process, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); right of travel, Shapiro v. Thompson, 394 U.S. 618 (1969); right of privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); right of access to courts, Bounds v. Smith, 430 U.S. 817 (1977); and an implied right of procedural fairness in criminal appeals, Douglas v. California, 372 U.S. 353 (1963).

130. 381 U.S. 479 (1965).

131. *Id.* at 484–86.

132. *Id.*

133. The ninth amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

134. 381 U.S. 475, 486–99 (1965) (Goldberg, J., concurring).

135. *Id.* at 493–94.

136. *Id.* at 500 (quoting Palko v. Connecticut, 302 U.S. 319 (1937) (Harlan, J., concurring)).

rights. For example, no specific source of the right of travel has been named, although the Court has on occasion implied that its source is in the privileges and immunities and commerce clauses.[137]

It is difficult to determine, without more explicit guidelines, where basic values, traditions, and penumbras are found, other than in a judge's personal view of what should be a fundamental right: "[F]undamental rights analysis is simply no more than the modern recognition of . . . natural law concepts. . . ."[138] At most, a nonresident employee might argue that his right to live in the community of his choice has been both assumed and so highly valued in American society that it must be regarded as fundamental. One proponent of strict scrutiny of municipal residence requirements has made just such an argument.[139]

This Comment proceeds on the assumption that *McCarthy* rejected the existence of *any* fundamental right to either employment or maintenance of a home in a chosen community, in part because it is highly unlikely that the Court would simply overlook other fundamental rights and in part because of the appropriateness of a less exacting standard than strict scrutiny.[140] Therefore, a municipal employee challenging a residence requirement must demonstrate constitutional protection based on something other than the fundamental rights strain of equal protection. To succeed, he must show that his personal interests in employment and community are sufficiently important to merit greater protection than traditional equal protection standards afford rights that are deemed less than fundamental.

IV. THE APPROPRIATE STANDARD

A. *The Intermediate Standard for Equal Protection Cases*

Recent equal protection cases have indicated that a personal interest need not be deemed fundamental in order to merit meaningful protection. Traditionally, under the rigid two-tiered system of applying either strict scrutiny or a rational basis test, a right deemed less than fundamental has been protected by the latter, a test that has been aptly described as "minimal scrutiny in theory and virtually none in fact."[141] In recent years, however, several Justices have displayed discomfort with the two-tiered equal protection analysis.[142] Commentators have noted that the Court has in the past

137. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Griffen v. Breckenridge, 403 U.S. 88 (1971); United States v. Guest, 383 U.S. 745 (1966).

138. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 416 (1978).

139. Kramer, *The Constitutionality of Post-Employment Residency Requirements*, 9 URB. LAW. 157, 168–72 (1977).

140. *See* text accompanying notes 141–79 *infra*.

141. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

142. In Craig v. Boren, 429 U.S. 190 (1976), Justice Stevens criticized traditional equal protection analysis:

> I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the

decade made increasing use of different standards of review of varying degrees of strictness.[143] While in the past the Court may have hypothesized a legitimate purpose for challenged legislation,[144] it now frequently demands that the espoused purpose be currently articulated, not a hindsight rationalization.[145] Furthermore, the Court has begun using an intermediate standard of review for special cases involving classifications of illegitimacy, gender, age, and handicap.[146]

Professor Tribe has identified two circumstances that trigger this intermediate review:

> First, intermediate scrutiny has been triggered if important, though not necessarily "fundamental" or "preferred" interests are at stake. . . . [E]ither a significant interference with liberty or a denial of a benefit vital to the individual triggers intermediate review. . . . Second, [this standard applies] if sensitive, although not necessarily suspect, criteria of classification are employed.[147]

Thus, the Court scrutinizes carefully legislation that impairs important or significant rights that could be deemed "semi-fundamental" or employs "semi-suspect" classifications. To date, however, the Court has explicitly articulated the standard only in gender discrimination cases.

Eight months after *McCarthy* in *Craig v. Boren*[148] the Court invalidated an Oklahoma statute that restricted the sale of 3.2 percent beer to men at least twenty-one years old and women at least eighteen. Strict scrutiny was inap-

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Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.

Id. at 212. However, he did not delineate that "single standard."

Justice Marshall has expressed increasing discontent with two-tiered analysis. Unlike Justice Stevens, who perceives a single standard, Justice Marshall finds many:

> I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. The Court apparently seeks to establish . . . that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.

San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting) (citations omitted). *See also* Chicago Police Dep't v. Mosley, 408 U.S. 92 (1972); Dandridge v. Williams, 397 U.S. 471 (1970) (Marshall, J., dissenting). Justice White has apparently endorsed much of Justice Marshall's analysis: "[I]t is clear that we employ not just one, or two, but, as my Brother Marshall has so ably demonstrated, a 'spectrum of standards.'" Vlandis v. Kline, 412 U.S. 441, 453 (1973) (White, J., concurring).

143. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1082–89 (1978); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20–25 (1972); Simpson, *A Method of Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663, 678–81 (1977); Treiman, *Equal Protection and Fundamental Rights—A Judicial Shell Game*, 15 TULSA L.J. 183, 193–95 (1979).

144. *See, e.g.*, Williams v. Lee Optical Co., 348 U.S. 483 (1955).

145. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972).

146. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1057–82, 1089 (1978).

147. *Id.* at 1089–90 (footnotes omitted).

148. 429 U.S. 190 (1976).

propriate because the classifications involved neither a suspect class[149] nor any fundamental right.[150] The statute would have survived a rational basis test. An Oklahoma survey had shown statistical differences between the drunk-driving arrest records of men and women in the eighteen- to twenty-year-old group. The Oklahoma legislature could have rationally believed that the state's interest in traffic safety would be served by denying 3.2 percent beer to males under age twenty-one.[151]

However, the Court applied neither test and instead invalidated the law under an intermediate level test: to be valid, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[152] The Oklahoma statute failed this test because although the state's interest in traffic safety was held to be a sufficiently important governmental objective, the state failed to demonstrate that it was substantially furthered by the gender classifications. The statute restricted only the beer's sale, not its consumption. Furthermore, the statistics failed to justify a conclusion that eighteen- to twenty-year-old men who buy beer are more dangerous than women of the same age. The Court concluded that because the relationship of gender to traffic safety was so tenuous, the classifications were not "substantially related to achievement of the statutory objective."[153]

B. *Basis for Application of the Intermediate Standard to Municipal Residence Requirements*

The *Craig* substantial relation test should apply to municipal residence requirements for much the same reason it applies to gender classifications. In both instances, the intermediate standard provides real protection, while the two-tiered approach provides either too much or too little. The Court may not have recognized gender as a suspect classification because of its reluctance to apply a standard whose mere invocation dooms a challenged practice to a finding of invalidity. But the Court has also been wary of granting legislators as free a hand with gender classification as it has given them with economic legislation. Most likely, the use of the intermediate standard has been an attempt to provide fair, meaningful review. Decisions following *Craig* have shown that the invocation of the substantial relation test does not trigger

149. In Frontiero v. Richardson, 411 U.S. 677 (1973), four Justices agreed that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." *Id.* at 682 (citations omitted). That view has never been expressed in a majority opinion, however, and in view of the Court's comfort with the substantial relation test, sex will probably remain a classification less than suspect.

150. *See* note 129 *supra*.

151. 429 U.S. 190, 221–28 (1976) (Rehnquist, J., dissenting). *But see* Justice Stewart's concurrence: "The disparity created by these Oklahoma statutes amounts to a total irrationality." *Id.* at 215.

152. *Id.* at 197. *See* Orr v. Orr, 440 U.S. 268 (1979) (affirming appropriateness of substantial relation test and holding invalid system that imposed alimony payment obligations on men only).

153. 429 U.S. 190, 204 (1976).

automatic approval or denial.[154] Rather, the intermediate standard protects a person's interest in equal treatment by government yet still permits a government to impose the "semi-suspect" classifications in exceptional cases. The judicial hurdle is thus made high but not insurmountable.

A municipal employee's interest in preserving both job and home deserves similar protection. Residence requirements impose a significant burden on municipal employees: a person must either forego municipal employment or give up a home in a chosen community. If an employee sacrifices either, he loses something of great personal importance. That loss should be imposed only for a reason that is important, rather than merely "not irrational."[155]

Both job and home occupy positions of importance in American society. Although under the due process clause of the fourteenth amendment a public employee's property interest in his job receives the limited protection of a right to a hearing if he is fired,[156] the Court has recognized that a liberty interest in employment is protected by fourteenth amendment equal protection and fifth amendment due process. In 1915 in *Truax v. Raich*[157] the Court invalidated an Arizona statute that set employment quotas for aliens. In holding that the statute violated the equal protection clause, Justice Hughes' opinion for a seven-member majority stated:

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. . . . If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.[158]

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154. The Court has upheld under the substantial relation test gender classifications that would not have survived strict scrutiny. *See* Parham v. Hughes, 441 U.S. 347 (1979) (Powell, J., concurring opinion necessary for the judgment); Vorcheimer v. School Dist., 552 F.2d 880, 888 (3d Cir. 1976) (held that establishment of two voluntary, single-sex schools violated neither rational basis nor substantial ralation test, *aff'd per curiam*, 430 U.S. 703 (1977) (equally divided Court). The Court has also upheld gender classifications having a "benign" purpose such as the correction of the effects of past discrimination. *See* Califano v. Webster, 430 U.S. 313 (1977). Several other cases have, however, employed the *Craig* standard to hold gender discrimination invalid. *See* Orr v. Orr, 440 U.S. 268 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977).

155. An argument for the use of a substantial relation standard for municipal residence requirement cases is made in Note, *Municipal Employee Residency Requirements and Equal Protection*, 84 YALE L.J. 1684, 1693–95 (1975). That note inferred the use of an intermediate standard in Sugarman v. Dougall, 413 U.S. 674 (1973), an alienage case, and suggested that standard as "[o]ne means of circumventing the more troublesome dimensions of the right to travel argument against residency laws." *Id.* at 1693. However, the note did not suggest the appropriate resolution of the question of validity but merely noted that "there is serious question whether the residency requirements in fact substantially further their putative purposes." *Id.* at 1704. Since the publication of that note, the Court has for the first time explicitly embraced an intermediate standard, providing some basis for predictions of the result of that standard's application to municipal residence requirements. *See* text accompanying notes 178–221 *infra*.

156. Arnett v. Kennedy, 416 U.S. 134 (1974), held that a public employee's property interest in his employment requires no greater due process protection than a post-termination hearing to review the employer's decision. Bishop v. Wood, 426 U.S. 341 (1976), further reduced the significance of property rights in employment by allowing a state to determine the terms of employment in such a way as to eliminate procedural safeguards for the employee. Still, some property right in employment remains, however slight, and adds to the significance of employment as a historically important interest.

157. 239 U.S. 33 (1915).

158. *Id.* at 41 (citations omitted).

Sixty-one years later in *Hampton v. Mow Sun Wong*[159] Justice Stevens' majority opinion quoted *Truax* and reaffirmed the importance of seeking and maintaining employment by holding invalid a United States Civil Service Commission rule that limited employment in federal competitive civil service to citizens. Justice Stevens found a violation of fifth amendment due process rights, holding that the Commission had no authority to promote the national interest by offering incentives for naturalization.[160] The Court rejected administrative convenience as a justification for such a "deprivation of an important liberty,"[161] declaring that the "disadvantage resulting from the enforcement of the rule—ineligibility for employment in a major sector of the economy—is of sufficient significance to be characterized as a deprivation of an interest in liberty."[162] The Court found it unnecessary to reach an equal protection challenge to the rule and instead decided that an alien's interest in employment requires a due process standard more strict than a rational basis test.[163]

It must be noted, of course, that both *Truax* and *Mow Sun Wong* are alienage cases. The Court has recognized alienage and national origin as suspect classifications and has often applied strict scrutiny of legislation that disfavors either class.[164] However, characterization of *Truax* and *Mow Sun Wong* as alienage cases does not affect their usefulness in determining the historical significance of personal interests in employment. *Truax* was decided before the Court recognized a separate, stricter level of review for suspect classifications.[165] *Mow Sun Wong* was decided on due process, not equal protection, grounds; the existence of a significant liberty interest in public employment, not the suspect nature of the class, determined the outcome.[166] Thus, these cases demonstrate that regardless of whether equal protection or due process is at issue, the Court has deemed some regulations that restrict employment to be deprivations of a significant liberty interest. Notably, *Mow Sun Wong* stressed the importance of government employment as a major sector of the economy. Like the federal civil service, municipal government employs a substantial portion of the work force. Both cases support the conclusion that when a municipal residence requirement forces a person to forego municipal employment to protect his choice of community, that person loses a significant right that is "of the very essence of . . . personal freedom and opportunity."[167]

Equally significant is a person's interest in establishing and maintaining a

159. 426 U.S. 88 (1976).
160. *Id.* at 116–17.
161. *Id.* at 116.
162. *Id.* at 102–03.
163. *Id.* at 103.
164. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971); Hernandez v. Texas, 347 U.S. 475 (1954).
165. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
166. 426 U.S. 88, 100, 116–17 (1975).
167. 239 U.S. 33, 41 (1915).

home in a community of his choice.[168] Freedom from unwarranted governmental interference in what should be matters of private choice is expected in a democratic society. The first amendment guarantees of freedom of speech, press, religion, and assembly, as well as the Constitution's implied protection of the rights of privacy and association,[169] surely spring from the belief that it is wrong for a democratic government to tell its people what to say and believe or with whom to associate. Because those freedoms are express and the implied rights fundamental, the Constitution affords them its strictest protection. One can reasonably expect that the Constitution similarly limits government's authority to tell a person where to make his home, so that his choice is free from governmental interference absent a significant reason, not a merely "rational" one.

The Supreme Court has recognized that activities and relationships associated with one's private home life merit special protection. Legislatures cannot prohibit the possession of obscene materials within one's home[170] or deny foodstamps because of unpopular living arrangements.[171] The third and fourth amendments grant express protection to "houses," with the clear intent of protecting not the house itself but a person's security within it.[172]

No municipal residence requirement is intended to interfere with what occurs within an employee's home. However, such interference does indirectly occur. The value of maintaining a home in a particular place extends beyond the walls of a person's house. The surrounding neighborhood, perhaps as much as anything else, greatly affects the quality of family life *within* the home. A family chooses to live in a particular house not only because of the design or price of the house, but also because of its nearby schools, church, parks, markets, or freeway, its atmosphere, its security, or its nearness to relatives. Some may prefer a certain neighborhood because of previous social or political ties or quite simply because they grew up there. The nature of the chosen community greatly affects the quality of a family's home life. For example, the prevalence of violent assaults in McCarthy's neighborhood threatened the stability of his household and forced him to risk his job by moving his family to a safer community outside Philadelphia.[173] McCarthy

168. The interest in maintaining a home in a chosen neighborhood should be distinguished from a person's interest in retaining possession of a particular house or apartment. Lindsey v. Normet, 405 U.S. 56, 73–74 (1972), rejected claims of a fundamental interest in "decent shelter" or "possession of one's home" advanced against an Oregon eviction statute. Although a municipal employee may wish to retain possession of a particular home, the interest advanced in this Comment as a significant personal interest is broader, encompassing the total relationship between a resident and the community in which he has chosen to reside.

169. *See* note 129 *supra*.

170. Stanley v. Georgia, 394 U.S. 557 (1969).

171. United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

172. The third amendment provides: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

The fourth amendment provides in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S CONST. amend. IV.

173. *See* text accompanying notes 107–11 *supra*.

testified, "Because of all these [assaults upon our children], my wife said she was leaving. At that time I pleaded with her to stay. . . . I have to work in the city. I have to live in the city. My wife said she was more interested in her children's life [*sic*] than in my job."[174] The choice of a new neighborhood was McCarthy's attempt to improve the safety and happiness of his family.

In *Moore v. City of East Cleveland*[175] the Supreme Court invalidated, on due process grounds, an ordinance that prohibited, among other living arrangements, a grandmother's residence with two grandsons who were first cousins, not brothers. Justice Powell's plurality opinion noted that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[176] The Court held that the East Cleveland ordinance interfered too greatly with the family's choice of living arrangements, finding that only a tenuous relationship existed between the arrangements prohibited and the city's legitimate interest in avoiding overcrowding, traffic congestion, and financially burdened schools.[177] Compliance with the ordinance in effect would have forced Mrs. Moore to either re-arrange her family by excluding one of her grandsons or move away from the community she had chosen for her home. Her interest in avoiding the ordinance's penalty or the resulting unfair choice was sufficiently important that the plurality imposed a due process standard remarkably similar to that in *Craig* and certainly more stringent than a rational basis test. Like the relationship between gender and traffic safety, the relationship between East Cleveland's interest and Mrs. Moore's living arrangements was "too tenuous"; just as it did in *Craig*, the plurality in *Moore* extended greater protection than it normally would.

Thus, a municipal employee has significant personal interests both in finding and holding employment and in maintaining a home in a chosen community. By requiring that a person choose between job and home, a municipal residence requirement threatens one of those two interests. The substantial relation test, by demanding that the municipality show more than mere rationality, lends some meaningful protection to these important interests.

V. Application of the Intermediate Standard

When applied to municipal residence requirements, the substantial relation test requires two showings: first, that the requirements have been imposed to serve an important governmental objective and, second, that establishment and maintenance of residence within a municipality will substantially further those objectives.[178] Both steps are difficult to apply with

174. McCarthy v. Philadelphia Civil Serv. Comm'n. 19 Pa. Commw. Ct. 383, 339 A.2d 634, 637 (1975) (dissenting opinion).

175. 431 U.S. 494 (1977).

176. *Id.* at 503.

177. *Id.* at 499–500.

178. *See* text accompanying note 152 *supra*.

certainty. "Important" and "substantial" are imprecise terms that have, as yet, been barely defined. Because the test was recently developed, few guidelines exist to delineate differences among objectives that are compelling, important, or merely legitimate or between relations that are substantial or merely rational. When courts hold a statute or ordinance invalid under the substantial relation test, they frequently avoid determining whether a state or municipality's advanced objectives are "important." Instead, they assume the objective's importance and analyze the relationship between means and ends.[179]

A. *Importance of the Governmental Objective*

The objectives said to be served by municipal residence requirements fall into seven general categories: (1) maintenance of the municipality's economic stability; (2) curtailment of inner-city cultural decline; (3) reduction of urban unemployment; (4) reduction of absenteeism and tardiness; (5) administrative convenience; (6) improvement of an employee's availability for emergency duty; and (7) development of community identity so that employees will feel they have a personal stake in the municipality's future.[180] Certainly all seven objectives are legitimate concerns of municipal government because they directly or indirectly affect the municipality's ability to provide for the safety of its citizens.

Only two of the objectives stand out as being arguably less than important. Unless absenteeism and tardiness reach epidemic proportions, they do not pose a direct threat to safety or welfare and, therefore, in most instances should not be deemed important. And, as *Mow Sun Wong* demonstrates, administrative convenience alone may not be a sufficiently important governmental objective to justify an otherwise invalid classification.[181] Evaluation of this objective most likely turns on the expense involved; if a great number of individual determinations, conducted at significant expense to the administrator, would result from invalidation of the rule, administrative convenience might become an important objective. But if a rule persists merely to keep matters simple, administrative convenience loses its importance. At this point in the analysis, however, it is sufficient to note that under certain circumstances any of the objectives suggested could be termed "important." Therefore, the second part of the intermediate standard becomes the primary measure of a residence requirement's validity.

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179. *See, e.g.*, Coban v. Mohammed, 441 U.S. 380 (1979); Parham v. Hughes, 441 U.S. 347 (1979).

180. These objectives have been distilled from the range of justifications offered for municipal residence requirements by both courts, *see* text accompanying notes 32–106 *supra*, and commentators, *see* text accompanying note 18 *supra*.

181. 426 U.S. 88, 116 (1976).

B. *Whether Objectives Are Substantially Furthered*

Once the governmental objectives are found, or assumed, to be important, the next step is to determine whether residence requirements substantially further those objectives. This second step has been described as a requirement of "close fit."[182] *Craig* held the Oklahoma gender classifications invalid because of a "far too tenuous"[183] fit between the means chosen (distinctions based on narrow statistical differences between men and women) and the important objectives served (protection of public safety).[184] The test requires more than a "rational" belief that governmental objectives will be advanced to some degree. *Craig*'s insistence on a "fit" that is more than tenuous amounts to a requirement that the government demonstrate a significant likelihood that the objectives will be furthered to a substantial degree.

Because this test of the validity of a municipal residence requirement demands such a close relationship between means and ends, it is proper to require that such conditions on employment actually affect the quality of an employee's performance on the job.[185] If the ultimate goal is not the improvement of city services through improved job performance, the fit is tenuous. A municipality therefore errs when it uses a municipal residence requirement to shore up a sagging economy,[186] prevent cultural changes within the inner city,[187] or reduce urban unemployment.[188]

1. *Objectives Unrelated to Job Performance*

Whether discussed under the right/privilege,[189] public coffer,[190] or "mutual financial support"[191] theories, the use of a municipal residence requirement to serve solely economic objectives represents an effort to ensure, as much as possible, that an employee spends his wages within the city. Causing a policeman to spend most of his wages within the city will neither make him a better policeman nor improve the quality of police protection.

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182. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1083 (1978).

183. 429 U.S. 190, 204 (1976).

184. *Id. See also* text accompanying notes 148–53 *supra.*

185. Most courts have decided the question of the requirements' validity by examination of the duties of the employees affected. *See, e.g.*, Hanson v. Unified School Dist. No. 500, 364 F. Supp. 332 (D. Kan. 1973) (teachers); Krzewinski v. Kugler, 338 F. Supp. 492 (D.N.J. 1972) (police and firemen); Abrahams v. Civil Serv. Comm'n, 65 N.J. 61, 319 A.2d 483 (1974) (secretary). However, when using a rational basis test, courts have frequently looked beyond the relationship between job performance and residence, and have instead considered purposes directed generally at all employees, as for example when a court utilized a public coffer theory. *See* text accompanying notes 49–51 *supra.*

186. *See* text accompanying notes 189–92 *infra.*

187. *See* text accompanying note 193 *infra.*

188. *Id.*

189. *See* text accompanying notes 34–38 *supra.*

190. *See* text accompanying notes 49–51 *supra.*

191. One proponent of residence requirements has suggested that "mutual financial support" is a compelling governmental objective in a declining urban center. *See* Hager, *Residency Requirements for City Employees: Important Incentives in Today's Urban Crisis*, 18 URB. L. ANN. 197, 221–22 (1980). However, nothing seems to distinguish the mutual financial support theory from the public coffer theory rejected by several courts. *See* text accompanying notes 49–51 *supra.*

Furthermore, residence requirements will not significantly improve a city's economy. In many American cities, shopping malls, discount houses, medical centers, and entertainment facilities operate either adjacent to highways outside the city limits or in small independent municipalities within the large city's limits. The mobility of most Americans suggests that much of an employee's spending may take place outside of the city, regardless of his residence. With the exception of property taxes, then, a residence requirement supplies no additional tax revenues from the employee, for a municipality can tax wages paid in the city to nonresident employees.[192]

Underlying a municipality's governmental objective to prevent inner-city cultural decline is the fear that suburban communities will lure away the city's employed citizens, leaving behind a population of poor, unemployed minorities. One proponent of municipal residence requirements has portrayed the future as bleak: "[A]s a city deteriorates . . . there is a probability that the central cities will become densely populated with persons dependent on public assistance. . . . [A]s residential blight and unemployment increase, crime rates may rise. Inevitable problems with education and other public services also arise."[193]

Preventing such decline is no doubt an important objective. However, as with economic objectives, the residence requirement is intended to affect something other than the employee's job performance. The cultural decline argument is a "but for the nail the war was lost" approach to stimulating urban health. The doom forecast for urban centers will hardly be forestalled, if at all, by the imposition of residence requirements on municipal employees. It is unlikely that any American cities are made up entirely of imperiled urban core. Most cities contain areas within their jurisdictional limits that are as culturally separated from low-income, minority neighborhoods as if they were distant suburbs. Municipal residence requirements may often mean that city employees will reside in exclusive, middle class neighborhoods adjacent to and culturally indistinct from exclusive, middle class suburbs. It is possible, then, for a municipal employee to meet the requirement and at the same to do no more service to the objective than would a nonresident. Thus, while a rational argument can be made that residence requirements do *something*, however small, to save the inner city, the relationship between means and end is less than substantial.

Furthermore, a municipal residence requirement without a durational element does little to promote employment of urban residents. The hiring of a job applicant who has become a resident only to qualify for the job or who accepts a job under a condition that he become a resident within a reasonable time does not benefit unemployed residents. In a tight housing market, hiring the former nonresident will actually work to the disadvantage of an unem-

192. Thompson v. City of Cincinnati, 2 Ohio St. 2d 292, 208 N.E.2d 747 (1965).

193. Hager, *Residency Requirements for City Employees: Important Incentives in Today's Urban Crisis*, 18 URB. L. ANN. 197, 221–22 (1980) (footnotes omitted).

ployed resident by bringing into the city someone able to pay more for the limited available housing, thus reducing the number of affordable dwellings. But more importantly, when imposed to serve the objective of reducing the unemployment of urban residents, the residence requirement is used to affect something other than job performance.

The above-mentioned governmental objectives of improving the municipality's economy, preventing cultural decline, and reducing urban unemployment, although not substantially served by municipal residence requirements, are nevertheless important and within the proper concerns of municipal government. Only the tenuity of the relationship between means and ends violates equal protection. The objectives may yet be served by other means that do not so greatly threaten significant personal interests. The war may yet be won with other nails.

2. *Objectives Related to Job Performance*

Other objectives do relate, some more directly than others, to the quality of an employee's job performance. However, mere connection between residence and performance will not suffice. To satisfy the intermediate standard, a municipality must demonstrate that a substantial relationship exists between an employee's residence and the duties of his job. If residence within the city limits results in only an uncertain likelihood that performance will be improved, an employee should not be forced to choose between a job and his community. Therefore, proper analysis must include examination of how substantially a residence requirement serves the important governmental objectives of reduction of absenteeism, administrative convenience, emergency availability, and development of community identity. As will be seen, the latter two objectives can best be examined by their applicability to certain categories of municipal employees.[194] The other two will apply generally to all employees equally.

The imposition of a residence requirement to reduce absenteeism or tardiness seems a drastic measure. Other, more effective means exist to enforce punctuality and attendance rules. For example, the threat of a reduction of wages or a delay of promotion in relation to hours late or days missed should serve equally the objective without impairing significant personal interests. The typical rush-hour traffic problems of many cities may make commuting by train or subway from a suburb faster than traveling to work from a residence within the city. Furthermore, the employee who resides outside the city may still live closer to his place of duty near the city's edge than a co-worker who lives in a distant part of the city.

The imposition of a municipal residence requirement on all employees equally, rather than on a case-by-case basis, certainly affects administrative convenience. Individual determinations might be required if the residence

194. *See* text accompanying notes 197–221 *infra*.

requirements were held invalid under an "irrebuttable presumption" rationale.[195] However, the resulting expense and difficulty in a city with a large work force would be a greater burden than an intermediate standard should require. The greater the number of individual determinations made, the greater the danger that the requirements will not be applied fairly to similarly situated employees. Nevertheless, imposition of the requirements equally on all employees may increase too greatly the danger of over-inclusiveness.[196] A middle approach aimed at determining the appropriateness of residence requirements for different classes of employees by looking at their normal duties should satisfy the requirements of the intermediate test. Thus, a municipal residence requirement will be a valid condition of employment if maintaining residence will substantially improve or affect the performance of the duties of the particular class to whom the requirement applies. The validity of the requirement under a substantial relation test will turn on whether the affected employee is, for example, a policeman, school teacher, or file clerk.[197]

Municipal employment can be divided into four categories according to the general nature of the work involved: (1) safety personnel, such as police and firefighters; (2) elected or appointed officers and administrative personnel, whose duties include policy making; (3) "general service" employees, such as file clerks, secretaries, and sanitation workers; and (4) "special service" employees, such as school teachers, counselors, and social workers. The duties associated with occupation within each category will determine the validity of imposing a residence requirement on each. Those duties should be evident from civil service job descriptions or from the content of an employ-

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195. In the early 1970s, the Court on several occasions employed the "irrebuttable presumption" doctrine to invalidate government practices that "classified people for a burden or benefit without determining the individual merit of their claims." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 497 (1978). The doctrine shared aspects of both equal protection review of classifications and due process determination of fairness. On the basis of irrebuttable presumption analysis, the Court struck down a college tuition system that precluded any student who had at one time been a nonresident from showing that he had become a legitimate state resident, Vlandis v. Kline, 412 U.S. 441 (1973), and a school system's mandatory leave requirement for pregnant teachers, imposed without individual determinations. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974). *See also* United States Dep't of Agriculture v. Murray, 413 U.S. 508 (1973).

The doctrine is probably of little aid when residence requirements are at issue for two reasons. First, the Court seems to have retreated from its earlier embrace of the doctrine. The Court has not invoked the doctrine in several cases that have presented what would appear to be irrebuttable presumption questions. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Weinberger v. Salfi, 422 U.S. 749 (1975). Second, it is difficult to say precisely what a municipality has presumed by its imposition of a residence requirement. As the Tenth Circuit noted in Mogle v. Sevier County School Dist., 540 F.2d 478 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977), in each of the irrebuttable presumption cases,

> [A] fact question was identified and then decided by a conclusive presumption. . . . [A] residency requirement does not involve such identification of a controlling fact question and decision of it by an irrebuttable presumption. There are numerous factors that may undergird the [Board's] policy . . . . It is not shown that application of the policy to this plaintiff involves a presumption against him on any particular point.

Id. at 484–85 (footnote omitted).

196. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973), and discussion in text accompanying notes 204–07 *infra*.

197. *See* note 185 *supra*.

ment contract. However, the existence of a substantial relationship between the performance of those duties and residence within the city will be less evident.

When a municipal employee's significant personal interests are at stake, evidence of that substantial relationship must be introduced, not presumed.[198] Absent that evidence, any determination of a residence requirement's validity would rest on judges' presumptions, hardly a satisfactory basis for deciding whether an employee will be required to choose between job and community. Review of municipal residence requirement cases shows that courts have failed to demand such evidence. Rather, in accord with traditional rational basis scrutiny, most courts have accepted the legislative presumption of a reasonable relationship.[199] Even when courts have upheld the requirements under a stricter standard of review, the relationship between means and ends has been accepted without statistical evidence or expert testimony.[200] Except for citation in *Krzewinski* to the reports of a presidential commission on law enforcement and a governor's committee on civil disorders,[201] neither courts nor commentators have cited studies or authoritative opinion demonstrating that any substantial relationship exists between residence and job performance. Such evidence is apparently in short supply, perhaps because neither lawmakers nor courts have demanded it. Despite the shortage of evidence, it is worthwhile here to predict the outcome of the application of the substantial relation test to each category of employees, with hope that the gaps will be filled some day by better evidence than broad generalizations about these employees' duties.

No court, regardless of the standard used, has invalidated on federal constitutional grounds a residence requirement for safety personnel. As noted above, *Krzewinski* relied on a presidential commission's report for justification of such a requirement. That 1967 report concluded:

> Aside from convenience, local residence avoids the impression that the police come from the outside world to impose law and order on the poor and minority groups and also avoids the risk of police isolation from the needs, morals and customs of the community. . . . Perhaps more effectively than any amount of training, off duty contact between police and the people they serve prevents the stereotyping of police by citizens and citizens by police. . . . Wherever possible,

198. Courts should be especially wary of allowing the impairment of a person's significant interests on the strength of "judicial notice" of a relationship between performance and residence. For an example of such judicial notice under a compelling interest test, see Fraternal Order of Police, Youngstown Lodge No. 28 v. Hunter, 49 Ohio App. 2d 185, 360 N.E.2d 708 (1975), *cert. denied*, 424 U.S. 977 (1976). *See also* discussion in note 20 *supra*.

199. *See, e.g.*, cases cited in note 118 *supra*.

200. In neither *Fraternal Order of Police* nor *Krzewinski* were any evidentiary hearings held. Fraternal Order of Police, Youngstown Lodge No. 28 v. Hunter, 49 Ohio App. 2d 185, 198–200, 360 N.E.2d 708, 716–18 (1975), *cert. denied*, 424 U.S. 977 (1976); Krzewinski v. Kugler, 338 F. Supp. 492, 495 (D.N.J. 1972).

201. 338 F. Supp. 492, 500 (D.N.J. 1972).

> police officers should be encouraged to live within the city limits for it is important officers have a feeling of commitment to the city, above and beyond the obligation to police it.[202]

Aside from this community identity objective, the emergency nature of the duties of safety personnel will remain an important consideration.[203] As noted above, this objective would probably be best served by a geographical proximity requirement. Nevertheless, the substantial relation test requires only substantial, not best, service of the objective. Justification likely exists for a determination that residence requirements for safety personnel bear a substantial relation to community identity and emergency availability objectives.

Any determination of the qualifications of officers and administrative personnel who engage in policy making involves not only the important objectives listed above, but also, as the Supreme Court noted in 1973 in *Sugarman v. Dougall*,[204] preservation of "the basic conception of a political community."[205] In *Sugarman* the Court invalidated a New York rule that limited eligibility for competitive civil service positions to American citizens, holding that the rule applied too broadly to both general service employees and policy makers.[206] The Court applied strict scrutiny and held that classifications of that type required a "greater degree of precision."[207]

Five years later in *Foley v. Connelie*[208] the Court upheld on the basis of *Sugarman*'s political community concept a New York requirement that state troopers be American citizens. Said Chief Justice Burger's majority opinion:

> The act of becoming a citizen is more than a ritual with no content beyond the fanfare of ceremony. . . . The individual, at that point, belongs to the polity and is entitled to participate in the process of democratic decisionmaking. . . . [W]e have recognized that citizenship may be a relevant qualification for fulfilling those "important nonelective executive, legislative, and judicial positions," held by "officers who participate directly in the formulation, execution, or review of broad public policy." This is not because our society seeks to reserve the better jobs to its members. Rather, it is because this country entrusts many of its most important policy responsibilities to these officers . . . . In sum, then, it represents the choice, and right, of the people to be governed by their citizen peers.[209]

Nonresidents, like noncitizens, have not joined the political community and, therefore, may be excluded from policy-making administrative positions. Nonresident employees are actually even further removed from the political

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202. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT, THE POLICE (1967), *quoted in* Krzewinski v. Kugler, 338 F. Supp. 492, 500 (D.N.J. 1972).

203. *See* text accompanying notes 42–44 *supra*.

204. 413 U.S. 634 (1973).

205. *Id.* at 647 (quoting Dunn v. Blumstein, 405 U.S. 330, 344 (1972)).

206. *Id.* at 643.

207. *Id.* at 642.

208. 435 U.S. 291 (1978).

209. *Id.* at 295–96 (citations omitted).

community than are those noncitizens who, as residents, are taxpayers and more direct contributors to the city's cultural life. The Court's holding that state troopers fit the description of such policy makers[210] could also lend further support to imposition of residence requirements on police.

It seems unlikely that residence in the city will significantly affect job performance by general service personnel. Unless studies show that development of community identity will encourage a secretary to type more efficiently or that emergencies are likely to arise that would require a file clerk close at hand, there seems little on which to base a finding of substantial relationship between residence and performance.[211] Furthermore, it is worth noting that in *Sugarman* the Court found the civil service exclusion of noncitizens over-inclusive because it applied to general service personnel as well as policy makers.[212] Of course, *Sugarman* was decided on the basis of strict scrutiny of alienage classifications and does not mandate a similar result under a substantial relation test. Nevertheless, it is likely that the exclusion would also be over-inclusive when tested under the intermediate standard.

The closest questions involve special services personnel. To what extent does community identity improve the relationships of teacher and student or social worker and client? How far beyond school walls do the duties of a teacher or counselor extend? What sort of emergencies arise that require the availability of social workers? The difficulty of answering these questions underscores the need for persuasive evidence about the relationship between performance and residence.

Municipal residence requirement cases also demonstrate the closeness of the questions. Although residence requirements for teachers have often been held valid under a rational basis test,[213] two cases, *Donnelly*[214] and *Hanson*,[215] have invalidated such requirements, the latter case holding the requirement "essentially arbitrary" and without "any reasonable basis."[216] In *Mogle v. Sevier County School District*[217] the Tenth Circuit held a residence requirement valid for a high school counselor in a school district that did not impose a similar requirement on teachers.[218] The court held the requirement reasonably related to legitimate goals of improving personal contact between the counselor and both students and their parents, increasing awareness of local community problems, encouraging greater involvement in local activities, and

210. *Id.* at 300.

211. For an example of application of the compelling interest test to general service employees, see Fraternal Order of Police, Youngstown Lodge No. 28 v. Hunter, 49 Ohio App. 2d 185, 360 N.E.2d 708 (1975), *cert. denied*, 424 U.S. 977 (1976). For an example of application of the rational basis test to a secretary, see Abrahams v. Civil Serv. Comm'n, 65 N.J. 61, 319 A.2d 483 (1974).

212. 413 U.S. 634, 643 (1973).

213. *See, e.g.*, Wardwell v. Board of Educ., 529 F.2d 625 (6th Cir. 1976).

214. Donnelly v. City of Manchester, 111 N.H. 50, 274 A.2d 789 (1971).

215. Hanson v. Unified School Dist. No. 500, 364 F. Supp. 330 (D. Kan. 1973).

216. *Id.* at 334.

217. 540 F.2d 478 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977).

218. *Id.* at 480–82.

simply having the counselor close at hand.[219] Even though the counselor lived only eleven miles from his employment in a sparsely populated area of Utah and no members of the school board had ever complained about his ability to perform his duties, his dismissal was sustained on the basis of a post-*McCarthy* rational basis test.[220] The court noted, however, that the espoused objectives were "less substantial than those outlined in *Wardwell*,"[221] thus raising doubt whether it would have decided the issue the same way under a substantial relation test.

Many of the community identity arguments that apply to safety personnel may seem to apply to special services personnel as well. An understanding of the ethnic or cultural background of students and counselees should improve a teacher's or counselor's ability to aid and communicate with the people he serves. However, requiring residence may be a more drastic measure than is necessary. Community identity could be encouraged as easily and effectively by requiring those employees to participate in specific community organizations or special study of the community's social make-up. Such a method would perhaps be insufficient for safety personnel, whose performance more directly requires the cooperation of all residents in the community served. Teachers and counselors, on the other hand, can perform their jobs well with less direct contact with the community. Therefore, it is possible to conclude that the relationship between residence and performance of these employees' duties is not sufficiently substantial to justify impairment of their significant personal interest.

VI. CONCLUSION

In the end, whatever the quantity of facts, figures, and expert opinion, intermediate review of municipal residence requirements will most likely amount to an application of the particular court's notions of what relations are "substantial" enough to justify a municipality's interference with its employees' significant interests. As a practical matter, substance, like fairness, can be measured only in the mind of the measurer; the test will always be somewhat subjective. Nevertheless, the intermediate standard is a useful means of narrowing the question, a way to clear the waters so easily muddied by the plethora of justifications that municipalities have thrown in to support the requirements. Ultimately, the question *can* be narrowly stated: Is it important to the performance of this employee's job that he live in the city? Put this way, the issue appears simple. But because the interests at stake—employment and choice of community—are significant, no simple answer will suffice. The review must be a meaningful, cautious, and reasoned determination, based on proof of the substance of the relationship of residence to duties.

Thomas A. Hampton

219. *Id.* at 485–86.
220. *Id.* at 483.
221. *Id.* at 484.